

No. 3624.

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IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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Louisa Pickens et al.,

*Appellants,*

*vs.*

J. H. Merriam et al.,

*Appellees.*

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ANSWER TO PETITION FOR REHEARING.

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ROBERT B. MURPHEY,  
JAY D. RINEHART,  
J. H. MERRIAM,  
HUNSAKER, BRITT & COSGROVE,  
*Solicitors for Appellees J. H. Merriam, Eugene  
Wellke, Alma J. Schmidt and Minnie S. Farns-  
worth.*

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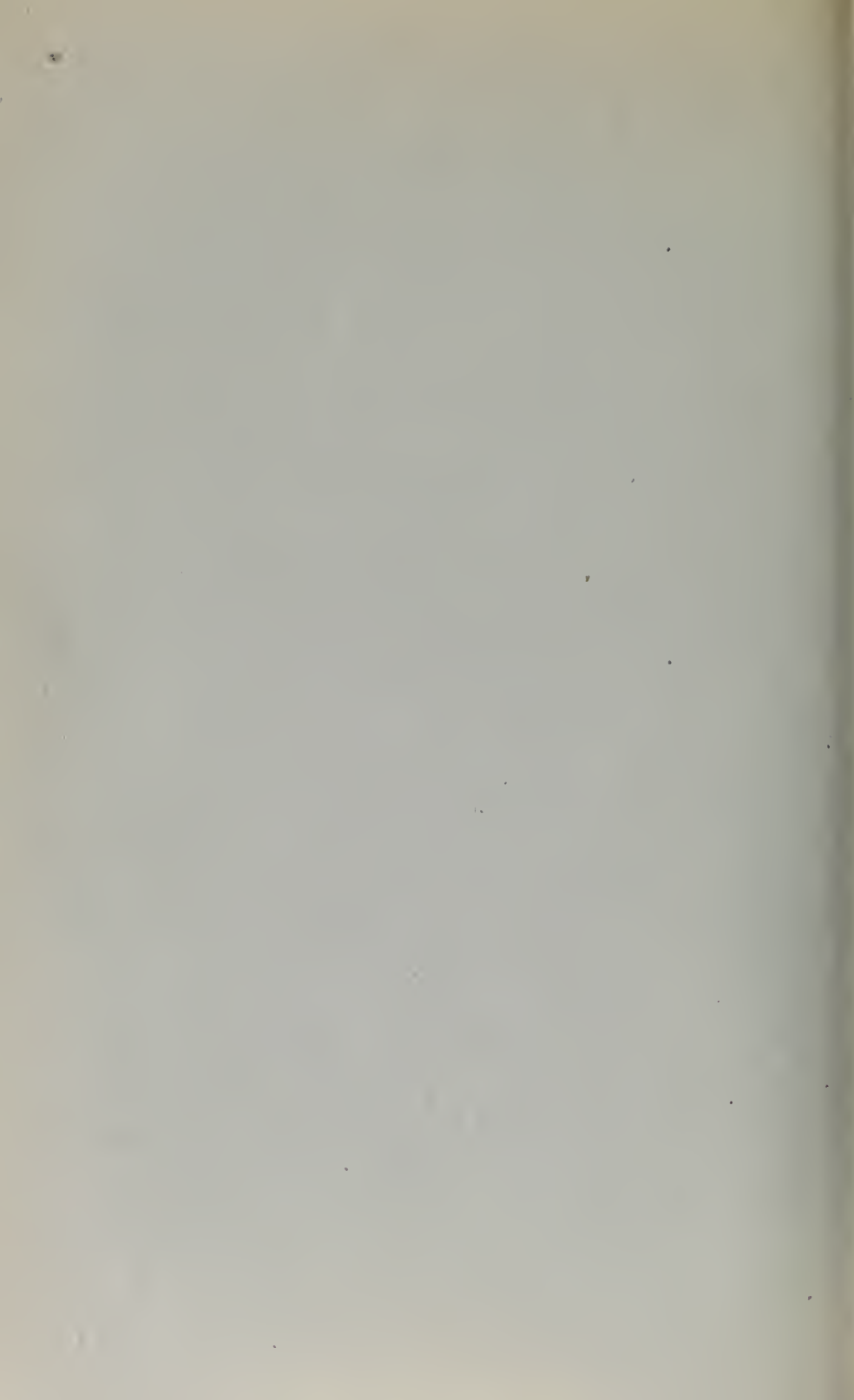
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**ANSWER TO PETITION FOR REHEARING.**

Although the rules do not provide for an answer to a petition for a rehearing, appellees invite the consideration of the court to the following short memorandum, and respectfully submit that the petition for a rehearing filed by the appellants herein is without merit and should be denied.

The correctness of the decision of this court upon the main issues presented by this case is not questioned by the appellants to the slightest extent; in fact, on page 19 of their petition they concede it to be correct.

Their petition for a rehearing is based solely upon the *assumption* that this court did not pass upon the claims of appellants as alleged heirs-at-law of

Jeanette Fensky. Appellees believe that appellants are mistaken in this assumption. Such claims were fully presented by appellants in their brief, and were completely answered and shown to be wholly without merit by appellees in their brief (pp. 135-196).

In appellees' brief we pointed out: *First*,—that any claim of appellants as alleged heirs of Jeanette Fensky was barred by the decree of distribution of her estate entered September 22, 1909. (See pages 135-160 of appellees' brief.) *Second*,—that even though this obstacle could be overcome, appellants are not and never were heirs of Jeanette Fensky as to any of her property under the provisions of subdivision 8 of section 1386 of the Civil Code of California (see pages 160-166 of appellees' brief; see also the very recent case of Estate of Simonton, 59 Cal. Dec. [advance sheets] 588, 190 Pac. 442); *Third*,—that even if the foregoing barriers were removed, in any event there were no unadministered assets of the estate of Jeanette Fensky in which appellants would be entitled to share, because Jeanette Fensky, during her lifetime, transferred to the appellees (other than appellee J. H. Merriam) the property, as to which appellants claim to be her heirs, and the same therefore was not a part of her estate at the time of her death (see pages 167-184 of appellees' brief); *Fourth*,—that any relief which appellants might otherwise have been entitled to was barred by their own *laches* in failing to seek relief for the period elapsing since the decree of distribution of the estate of Jeanette Fensky on September 22, 1909. (See

pages 191-196 of appellees' brief.) Each one of these four propositions defeated their claims as alleged heirs of Jeanette Fensky. Hence, this court was abundantly justified in saying in the last paragraph of its opinion that it was "of no concern of the Ferdinand Fensky heirs" what Jeanette Fensky "might be pleased to do" with her estate.

Furthermore, this court in affirming the judgment of the court below, necessarily held that the claims of appellants were wholly without merit, and that there was no equity in their case. It can hardly be possible that the claims of appellants as alleged heirs of Jeanette Fensky, to which the latter third of each of the briefs on file was devoted, and which were also argued pro and con at the oral argument, were not considered and ruled upon by this court against appellants.

It is true that the bulk of the opinion of this court is devoted to a detailed discussion of the claims of appellants based upon the alleged fraud of Jeanette Fensky (the predecessor in interest of appellees) in procuring assignments of appellants' interest in the estate of Ferdinand Fensky, the deceased husband of Jeanette Fensky, but this, no doubt, was due to the fact that appellants themselves have always heretofore regarded such alleged fraud as the principal foundation of their action and have treated their claims as alleged heirs-at-law of Jeanette Fensky as of secondary and minor importance, in which they had little faith, and no hope of success. A mere reading of their

amended bill of complaint points clearly to the conclusion that the fraud alleged is the *gravamen* of their action. Appellants are in no position, therefore, to complain that this court in its opinion likewise treated their alleged cause of action on the ground of fraud as the principal point in the case.

The claims of appellants as heirs-at-law of Jeanette Fensky are so obviously without any merit that, if it be possible that such claims have not already been considered and passed upon by this court when it *affirmed* the judgment of the lower court, they may be quite easily passed upon in denying the petition for a rehearing.

For each of the reasons herein stated, any one of which is sufficient in itself, appellees respectfully submit that all of the issues presented by the briefs and at the oral argument have been correctly determined by this court; that appellants are not entitled to any relief, either upon the ground of fraud or as alleged heirs-at-law of Jeanette Fensky; that there is no equity in their case; and, consequently, that their petition for a rehearing should be denied.

Respectfully submitted,

ROBERT B. MURPHEY,

JAY D. RINEHART,

J. H. MERRIAM,

HUNSAKER, BRITT & COSGROVE,

*Solicitors for Appellees J. H. Merriam, Eugene Wellke, Alma J. Schmidt and Minnie S. Farnsworth.*